Of Aspirations and Operations: The Governance of Multinational Enterprises by Third World Nations

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OF ASPIRATIONS AND OPERATIONS:
The Governance of Multinational Enterprises by Third World Nations*

Michael W. Gordon**

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* I am indebted to Professor W. Michael Reisman of the Yale Law School for some of the ideas from which I have developed this article. In his book, Folded Lies, Professor Reisman discusses myth systems and operational codes. He is in no way responsible, however, for what I have done to his ideas.

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VII. The Interrelationship of the Three-Tiers of Governance

Third World Minister of Trade: "Counselor, your file appears to be nearly complete. I think we are almost ready to approve your proposed manufacturing facility."

Multinational Enterprise Lawyer: "I believe the file is complete. The National Commission on the Transfer of Technology approved our transfer of technology agreement, but their approval was obtained only after long negotiations regarding uncertainties in your law. The Central Bank approved our application for the exchange of your currency for dollars, after negotiations on amounts and the applicable rate of exchange. Your government approved our OPIC insurance scheme, although we had to convince them that our desire for insurance did not mean we view your administration as unstable. We have been to several ministries and have agreed to provide a health clinic, a sports facility, and transportation by our company bus between the plant and the center of town. We worked out an investment incentive plan to defer taxes for several years by locating in a high unemployment area. We further agreed to a level of sixty-five percent domestic content in our manufacturing, increasing to eighty percent by annual increments. We agreed to export a fifth of our production to other nations in your common market area. The company will be a joint venture, with classes A and B stock. Class A, constituting fifty-one percent of the equity, will be available only to your nationals. We will retain the remaining forty-nine percent class B stock. The board of directors will be divided between foreign representation of the parent plant and your nationals in the same percentage as the equity. We have agreed to promote a technical training program in your capital city, and to undertake research and development in your country. It has been a long process but I believe we have read your laws carefully and have received approval by all the necessary authorities."
Third World Minister of Trade: "Yes, your company is fortunate to be able to enter our excellent developing market. But there is one last item. You need a market feasibility study completed for my final approval. Here is a business card. My brother-in-law is a consultant. He will be happy to do this study for you."

I. INTRODUCTION

The Operational Code at work. That nebulous array of unwritten regulations adds a dimension of uncertainty to the maze of written laws often sufficient in magnitude to cause multinational enterprise negotiators to terminate discussions with a sense of futility. A proposed investment is not worthwhile, negotiators believe, without reliable predictions of future behavior, but there may be a demonstrably greater amount of predictability than initially appears in dealing with third world governments.

If multinationals do not have some assurance of how their investments will function and be treated, the level of foreign direct investment will diminish. Uncertain sounds from host nation governments do not prepare a multinational to invest any more than uncertain sounds from a trumpet prepare an army for battle. It is neither political nor economic philosophy which reduces multinationals’ interest in investing, but rather uncertainty about the stability of the particular political and economic system.

To the consternation of market economy third world nations, multinationals often function effectively in socialist nations where there is a "negative surprise ratio"—a sureness that once the rules of the game are established they will not change abruptly. Those same enterprises may refuse to enter a particular market economy third world nation where the only consistency achieved is inconsistency due to abrupt changes in the rules under which the multinationals must function.¹ There is usually a degree of structure and

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¹ Government officials in market economy developing nations often express dismay at the reluctance of foreign multinationals to invest in their market economies, and their eagerness to initiate investments in socialist nations. Developing nations' officials fail to understand that although a multinational enterprise is adaptable to contrasting economic and political systems, it has a limit of tolerance for severe fluctuations in policy within a nation after it has made its investment. Multinational officials sometimes speak positively of the "negative surprise ratio," a consistent and predictable approach to foreign investment in Eastern European nations. Because of the unique restrictions confronting multinationals negotiating for direct foreign investment in socialist nations, it may take longer to receive
sense, however, to the labyrinth of regulations confronting the multinational enterprise. If the labyrinth is comprehensible, corporations will be willing to invest in these nations, or at least their decision not to enter the foreign market will be based on a thorough understanding of the obstacles to a profitable venture. This article will outline a framework of corporate regulation by third world nations and illustrate how that framework is not static but frequently is affected by a variety of forces which change the form and substance of regulation.

II. THE GOVERNANCE OF MULTINATIONALS—THE EDGE OF DISCOURAGEMENT

No nation entirely prohibits foreign trade. A few prohibit foreign direct investments but none are developed market economies. While some nations require registration, few require review and approval of new foreign direct investment. The establishment of a national foreign investment review organization in a developed economy, such as the Foreign Investment Review Agency in Canada, usually generates strong criticism from foreign investors.

approval of the investment than in many developing nations. Once an agreement is concluded with a socialist government, however, there may be a considerably more predictable approach toward the investment than has been the case in many developing market economies.

2. Some nations reserve foreign trade to the state. Foreign trade limited to state organizations is an attribute of socialist nations. Market economies which have moved toward socialist ownership of the means of production and distribution normally have not nationalized commercial trading activities, although the activities may be regulated extensively. State or foreign trading organizations possess numerous conceptual and practical variances from more traditional trading relationships. See, e.g., J. Quigley, The Soviet Foreign Trade Monopoly: Institutions and Laws (1974); Quigley, Soviet Foreign Trade Agencies Abroad: A Note, 37 Law & Contemp. Pros. 465 (1972). State trading organizations create some unusual problems in dealing with the West, including their status under the GATT, and how they are affected by the United States Foreign Sovereign Immunities Act of 1976. 28 U.S.C. §§ 1330, 1602-1611 (1976).

3. Foreign direct investment and foreign commerce should be distinguished. Foreign direct investment usually involves and increases foreign commerce. Foreign commerce alone is often the first step by which an enterprise begins to penetrate foreign markets. The commerce may increase to where it is appropriate to begin production abroad, or the host nation may begin to require local production to reduce imports. The term "home nation" will be used to identify those nations, usually in the industrialized world, from which the trade is initiated or within which the parent or controlling corporation which has a subsidiary abroad is located. The term "host nation" is used to identify the nation in which the subsidiary or affiliate enterprise is located.

Such a review, premised on whether the investment will be beneficial to the economic development of the host nation, is an appealing device for opposition political parties. The review agency may be a nebulous, veiled organ, enshrouding the political or economic persuasions of its administrators in the mists of the operational code. It is an ideal institution for the government to quietly promulgate practices which may be in marked contrast to conceptions generated by the firm language of the review legislation.

The prohibition of foreign direct investment tends to follow socialist nation development ideology. It has proven, however, to be only a temporary prohibition in most nations in the socialist sphere. Cuba is one developing, socialist nation which prohibited


Creation of the Canadian FIRA was central to the Canadian legislative response to growing nationalism and concern over the impact on Canada of decisions made abroad by directors of home nation parents of Canadian subsidiaries. Many United States investors view both the FIRA and Canadian policy as excessively restrictive of business activities and contrary to Canadian development interests. Two such restrictive actions were mandating an extensive use of French in business transactions and the national energy policy proposing Canadianization of oil production. See *Energy, Mines and Resources, Canada, The National Energy Program* (1980) (a Canadian government publication in pamphlet form).

foreign direct investment for nearly a quarter of a century. The absence of foreign direct investment in Cuba, however, is neither a function of Cuba's developing status nor its socialist political-economic philosophy. It is related more to the fact that this long period of conceptualistic sterility is a characteristic of socialist revolutions. Cuban leaders now accept, as have leaders of other nations following this predictable process, that the achievement of developmental goals necessitates, or at least is accomplished more rapidly by, reintroducing some foreign direct investment.

Where socialist nations have opened the door to foreign direct investment it has been on an extremely limited basis, centering on a unique socialist form of joint venture. That form retains, at least in theory, the majority ownership interest and control in the host nation's state government or its state commercial enterprise. The entry of Cuba into the club of socialist nations encouraging joint venture foreign direct investment was predictable. The Cuban law follows the basic framework of joint venture legislation in socialist nations in Eastern Europe, and, to a more limited degree, the form adopted in China.

ture theory is working its way into socialist economic law. Until recently, the absence of foreign direct investment in socialist nations has proven to be a temporary phenomenon caused by economic alterations fundamental to a socialist revolution. It is a combination of the absence of interest of foreign investors after a massive nationalization (usually without adequate compensation) and the ideological purity which disallows absentee or total private ownership of the means of production and distribution. But the ideological purity tends to tarnish in time; foreign investors return after old wounds have healed, or new investors replace the old. Ideological purity may be maintained if joint ventures are admitted only as transitory institutions. Even capitalist institutions should be admitted temporarily if they speed the socialist nations to their destiny of communism.

6. Economic Associations Between Cuban and Foreign Entities, Legislative Decree No. 50 (Feb. 15, 1982), translated in Possibility of Joint Ventures in Cuba, CAMARA DE COMERCIO DE LA REPÚBLICA DE CUBA 8, 8-12 (Feb. 1982) [hereinafter cited as Cuban Joint Venture Decree].

7. The Yugoslav model is sui generis. Ownership of the means of production and distribution is not vested in the state, but rather in the workers employed in a particular plant at a given time. The concept of workers' social property involves much mythology. The state is an invisible hand which governs, directly and indirectly, much of the activity of an enterprise. The system, nevertheless, is quite different from the structures in other Eastern European nations.

The existence of foreign direct investment in all but a very limited number of nations of the world affirms that the socialist practice constitutes an aberration. The presence of foreign direct investment is the norm. But its presence should not suggest that it is viewed with consistent enthusiasm by host nation governments, the domestic private investment sector, labor organizations in the host nations, and critics of the press and academia. Some observers consider it as, at best, an unwelcomed guest, acknowledged as a necessary component of the developmental process such as technology, employment, import substitution, export promotion and access to hard currencies. These benefits are a trade-off; acceptance of foreign direct investment is often thought to be threatening, to cause dislocations or even a permanent, negative paralysis to political and economic structures and to social and cultural institutions and traditions of the nation.

Hostility to or suspicion of multinationals is present to some degree in most host nations, whether they are developing or socialist nations. This is true even of some developed host nations. Foreign investors must be aware of the potential consequences of such hostility, and how it is reflected in the written and unwritten framework of foreign direct investment laws.

The nations of the world which permit foreign investment may be divided into two groups: nations which openly accept foreign direct investment and nations which restrictively accept foreign direct investment. Those nations that openly accept foreign direct investment are primarily the larger developed nations with a large elements of control and participation in the profits of the enterprise. Both areas were subject to considerably greater attention in the Eastern European joint venture laws. Further legislation helped to clarify some of the problems. The marked contrast in the Chinese law, especially its brevity, discloses that China had little recent experience in initiating legislation governing commercial relations with the West. Additionally, and more important for a conceptual understanding of trading with China, the legal system’s role in China differs from its role in the West. In China, there is a much greater concentration upon negotiation to initiate trading relationships and upon conciliation in resolving disputes.

9. The Cuban Chamber of Commerce material promoting the Cuban joint venture law states that the law is intended “for the basic purpose of expanding its exports and international tourism.” Cuban Joint Venture Decree, supra note 6, at 2. Not all socialist nation joint venture laws identify the goals which the nation seeks to achieve by adopting joint venture legislation. But the Cuban law states, “the country’s economic development requires this type of association in those activities that call for more financial resources, raw materials, technologies and markets than we have available in order to employ our material and human resources.” Id., Preamble. It implies more of a balanced partnership contribution than is realistic for Cuban economic development. The essential contributions will be those from abroad.
base of locally owned direct investment. In these countries the addition of foreign direct investment is not viewed as a threat to domestic institutions.

Some smaller developing nations appear to openly accept foreign direct investment by way of incentive-based legislation. These laws afford easy entry and minimum operational restrictions and comparatively free repatriation of profits. While this is characteristic of nations which openly accept foreign direct investment, other characteristics of these smaller developing nations suggest they are actually applying a more restrictive basis. For example, these countries are suspicious of the possible negative impact of the foreign investment upon the nation’s cultural, economic and political institutions. This concern may be expressed in nominally restrictive operational codes even though the written laws of the nation at the same time evidence a more open acceptance of foreign direct investment.

Nations which restrictively accept foreign direct investment will concentrate their restrictions on one or more of the three above noted areas: the ease of entrance, restrictions on operations, and the regulation of the repatriation of profits. A multinational thus may discover it is easy to enter a nation, but may subsequently confront severe operational restrictions or complex regulations on the repatriation of profits. Other times, the nation may be difficult to enter, but once entered may be less restrictive in regulating a company’s operations or profit repatriation. When the law invites investment but the restrictions are severe in all areas of investment, the nation approaches a \textit{de facto} prohibition of foreign direct investment.

Nations currently allowing foreign investment often strive to create regulations which narrowly fall short of the degree of restrictiveness which would cause a large scale withdrawal of foreign direct investment. Those multinational enterprises which possess needed investment obviously do not assist host nations in achieving that goal. Multinationals react adversely to any form of regulation and often attempt to convince host nation authorities that the nation either has achieved the nadir of restrictiveness, or, more likely, that the nation is retarding development. They argue, that the restrictiveness has increased above the Edge of Discouragement. Each nation has such a level which the combination of its written and unwritten laws must not exceed.
The Edge of Discouragement slopes upwards in the degree of acceptable restrictiveness over time. Foreign investors learn to function in an atmosphere of increasing restrictiveness, as long as the point of investment impossibility is not reached. It is difficult for host nations to determine the optimum level for the regulation without discouraging foreign direct investment. No two developing or socialist nations possess such similar domestic, political, economic, and social characteristics that a uniform code of regulation of direct foreign investment could be produced. The framework of any one nation for the governance of foreign direct investment consequently may consist of a sophisticated and finely tuned set of norms, or it may include elements of regulatory absurdity, based on misconceptions either of the impact of the foreign investment, or the ability of the host nation to regulate without causing the withdrawal of needed foreign investment.

Where a regulatory framework grows out of concern that large scale foreign direct investment inevitably will cause an adverse impact on the host nation, the resulting regulatory process will probably be poorly constructed. The larger developing nations, often referred to as advanced developing countries (ADCs), or newly industrializing countries (NICs), including, for example, Brazil, India and Mexico, need not be fearful of a large degree of foreign influ-
ence such as may easily occur in many of the smaller developing nations. The latter often must deal with the presence of the single, large, dominant multinationals.10

Multinationals with unique technology occasionally create special conflicts within the advanced developing countries. These are isolated circumstances, however, that do not generate threatening situations for those nations with regard to the aggregate of foreign direct investment.11 These advanced developing countries, however, may become concerned if a large percentage of their gross national product is generated by foreign direct investment, especially if the investment is largely by multinationals from a single home nation.12 That concern is probably directed more to the na-

10. An OAS study comparing gross national products of OAS member nations with net sales of major multinational enterprises shows that only Brazil, Mexico and Argentina have larger GNPs than the net sales of General Motors, Standard Oil of New Jersey, Ford Motors, and the Royal Dutch Shell Group. Venezuela, Chile, Colombia, and Peru were interspaced with GE, IBM, Mobil Oil, Chrysler, Unilever, IT&T and Texaco, but 43 additional companies preceded the next nation, Uruguay. 1 ORGANIZATION OF AMERICAN STATES, PAPERS OF THE CAPITAL MARKETS DEVELOPMENT PROGRAM 86 (June 1974) [hereinafter cited as OAS PAPERS].

11. Two recent experiences in India illustrate these special conflicts. India enacted a law mandating joint ventures, and attempted to apply it to both the Coca Cola and IBM subsidiaries in India. Foreign Exchange Regulation Act of 1973. IBM has no joint ventures anywhere in the world, a policy it has pursued successfully only because of the leverage it possesses by owning advanced technology. The company policy is discussed in 1 M. GORDON, MULTINATIONAL CORPORATIONS LAW—MEXICO, CENTRAL AMERICA, PANAMA, AND THE CENTRAL AMERICAN COMMON MARKET B.24 (1982) [hereinafter cited as 1 GORDON, MULTINATIONALS]. In India, IBM refused to alter its structure and admit Indian equity participation. That response was expected. The experience of Coca Cola was quite different because it did not reject the concept of the joint venture. Many of its foreign bottlers are wholly locally owned, a characteristic typical of franchise operations. The Indian government demanded, however, that the local enterprise would have to fully produce the drink within India. Although officials insist that they never directly asked Coca Cola to disclose the syrup formula which is the basis of the cola drink, they agree that disclosure would have been a necessary consequence of meeting the requirements of the law. Predictably, as with IBM, Coca Cola refused and withdrew. The production of soft drinks was left in the hands of many inefficient domestic producers and the public was left without a popular drink. In each case, the government could have been more direct and simply ordered the company out of India. The advantage of the chosen method was that it allowed India to state that the companies were never asked to leave. Without additional knowledge, the requested changes appeared perfectly reasonable. Further, similar requests were being agreed to by many other multinationals.

12. The pre-1959 relationship of Cuba and the United States illustrates such a connection. The United States was the overwhelmingly dominant source of trade and foreign direct investment in Cuba. Cuba, consequently, was able to expropriate all foreign owned property, refuse payment to United States investors, settle with other nations and avoid any immediately successful economic retaliation. See M. GORDON, THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY (1976); Gordon, The Cuban Claims Act: Progress in the Development of a Viable Valuation Process in the FCSC, 13 SANTA CLARA LAW. 625
ture of the relationship with individual multinationals than to the perceived negative effects of extensive foreign direct investment on the nation's social, economic, and political relationships and institutions.¹³

Smaller developing nations, by virtue of their dependency status, must be more concerned with foreign direct investment than the more advanced developing countries.¹⁴ The concern is greater here because it is more difficult for these smaller nations to generate sufficient development without foreign direct investment, and because the institutions which regulate foreign direct investment are far more fragile than those in the advanced developing countries.¹⁵ Consequently, it should be apparent that different levels of need for foreign direct investment exist as do different levels of hostility towards its presence, and different levels of capacity to govern discouragement. Further, vastly different levels of institutional capacity and efficiency exist among various nations to effectuate any chosen form of governing framework.

Multinationals clearly have an impact on institutional structures of host developing nations. This fact, however, does not justify accusing multinationals of unlawful or amoral conduct or of any wrong greater than bearing the burden of visibility. The size of these corporations makes them a natural target of blame for the

¹³. The effects may result from extensive political lobbying, the payment of bribes, the diminishing of a nation's indigenous culture, the contribution to an economically unsound balance of payments and other sources. The developing and socialist nations, possessing currencies which are frequently unstable and often unacceptable to the larger trading nations, must be concerned with the impact of foreign direct investment on currency flows. The regulatory framework of the most advanced developing countries, illustrated by the Brazilian currency regulations, discloses a major concentration on currency exchange and profit repatriation. For a discussion of profit remittance law, see Rosenn, Regulation of Foreign Investment in Brazil: A Critical Analysis, 15 LAW. AM. 307 (1983).

¹⁴. The author refers to the smaller developing nations which do not have vast, known and producing natural resources from which they achieve status as advanced developing countries, or which have not developed their human resources to gain such status, as dependent rather than developing nations. See Gordon, Developed, Developing and Dependent Nations: Central American Development in a New Economic Realignment, 2 J. INT'L L. & ECON. 1 (1976).

¹⁵. One may not think that the Quaker Oats Company is a significant, large, multinational enterprise, but its net sales exceed the annual gross national product of Paraguay. When small, dependent nations admit not only enterprises the size of Quaker Oats, but numerous other multinationals whose net assets dwarf the host nation's GNP, the countries concern over the possible negative impact of the corporations is understandable. See OAS PAPERS, supra note 10, at 86, 92.
infinite ills of the often troubled economies of developing nations. Multinational enterprises should, nonetheless, convince governments in developing nations that the enterprises cannot function if subjected to endless regulation or abrupt fluctuations in the regulatory pattern.

Host nations must not view multinational enterprises as a bottomless pit of resources transferable to the less affluent sectors of the world through cleverly changing the rules of the game. Multinationals should not be criticized when they ask for predictability and assurance that laws in the host country will not inordinately change. Investors are aware that the rules will change, but they are justifiably hesitant to invest when the rules fluctuate between policies of nationalization and denationalization, and when rules require major alterations to formerly acceptable structures.


17. The cases of Coca Cola and IBM, supra note 11, outline the retroactive application of joint venture nationalizing legislation. The Andean Common Market Decision 24 also required structural alterations to receive benefits from the Market. See Decision 24 of the Commission of the Cartagena Agreement: Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties, Dec. 31, 1970, translated in 11 INT’L LEGAL MAT. 126 (1972), as amended, translated in 16 INT’L LEGAL MAT. 138 (1977). See also Oliver, The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment, 66 AM. J. INT’L L. 763 (1972). The Mexican legislation, while not specifically retroactive, has been viewed as having the same result. See Creel, “Mexicanization”: A Case of Creeping Expropriation, 22 Sw. L.J. 281 (1968). Mexico has adopted tax measures which make it more beneficial to own a minority interest than a majority interest in some enterprises. The general foreign investment law mandates Mexi-
Often when representatives of multinationals criticize changes in the rules of the game, a pattern of predictability actually exists of which the multinationals are unaware and with which they are unprepared to deal. To consider only the written investment laws of the host nations is to overlook two important elements of the regulatory framework of foreign direct investment. One element includes those declarations of multi-nation organizations which have neither gained status as international law, nor found their way into the host nation’s domestic law. The second includes those unwritten operational practices which constitute “the way things work.”

III. Governance by International Law

Besides the framework of the host nation’s regulatory process, multinationals are also governed by the laws of their own (home) nations, as well as by international law. Neither of these laws has proven of much comfort to host nations, whether they are developing, socialist, or developed. Even though home nation laws may have extraterritorial reach, they are enacted to achieve home nation goals and not to achieve interests of foreign host nations. Although ancillary benefits may accrue to the host nations, the legislative bodies of home nations should not be expected to pass laws contrary to the interests of their own corporate enterprises functioning abroad.

Expectations should not be unduly placed on international law. Purported international legal norms include many concepts formulated decades ago by processes stimulated and controlled by developed nations. Developing and socialist nations now reject these concepts whenever they are thought to ignore or discriminate against the economic development of these nations. It is appropriate, however, to comment on the governance of multinationals by home nations and by multinational authorities. This article will note the inadequacies of this form of regulation. It will also emphasize that the most effective control of foreign direct investment is through a host nation’s regulatory framework, which can be both effective and compatible with the achievement of fair relations in international trade.

IV. Governance by the Home Nation—United States Law

The regulation of United States’ multinationals abroad encompasses an extensive scheme of control. While both state and federal laws govern corporations within the United States, federal law has the most significant extraterritorial consequences. These federal laws are generally of two classes. First are those laws enacted without serious consideration of their impact in the foreign sphere. They are concerned mainly with domestic issues, but their effect extends to foreign activities. These laws, exemplified by United States antitrust legislation, may have unintended and negative consequences abroad.

The second group are laws which are enacted to resolve specific international conflicts. In so doing, they also generate extraterritorial control over foreign activities of United States’ multinationals. This second group of laws is less likely to have an unintended, negative impact abroad. When the conflict generating a legislative response, however, involves more than one foreign nation and national preference choices must be made, certain foreign nations may be harmed to the benefit of others. An illustration is the United States anti-boycott law, in which political choices were made between relationships with Israel and Arab nations.

What might be a third, but largely non-existent, group are laws which would govern activities of multinationals abroad, neither exclusively passed for the benefit of home nation trade, nor to resolve specific international trading conflicts solely from the home nation perspective. They are laws enacted with the primary motivation of assisting in third world development. This third group is mostly an empty class, much to the disappointment of the

18. This article does not discuss whether United States laws, applied to American multinationals abroad, deal fairly with the socialist and developed worlds. If such fairness is achieved, it may be because the laws must be equitable to be of a long term usefulness to the United States. The concept of fairness in trading is a scarcely studied subject. For a discussion of fairness relating to commercial transactions with Latin America, see Kozolchyk, Fairness in Anglo and Latin American Commercial Adjudication, 2 B.C. INT’L & COMP. L.J. 219 (1979).


developing world. The sparcity of such laws should convince host nation governments that developed nations are not likely to be the source of any substantial regulatory pattern favorable to the host nations.

A. Laws Resolving Domestic Problems

1. Antitrust Laws

The United States antitrust laws were a response to restraints of trade within the United States. The extension to foreign commerce was not to resolve an existing international trade conflict. The growth of international trade since 1890 has given an importance to the brief Sherman Act words regarding foreign commerce that may never have been intended, and which would be better addressed by more specific legislation designed to resolve contemporary foreign antitrust conflicts.21

The current law, however, is found principally in cases, not in the Sherman Act. The principle of these cases is that the activities of enterprises abroad violate the Sherman Act when those activities have an adverse effect upon commerce within the United States — a view which generates much hostile foreign reaction. That reaction, whether in the form of blocking laws or clawback provisions,22 reveals that the United States antitrust laws are con-
considered by foreign nations to be both an infringement on national sovereignty and adverse to host nation trade development. These retaliatory responses have a profound effect and bring to the legal institutions of trade relationships a political and economic tension which hinders world trade. They also establish a negative norm of conflict which will affect trading relationships well beyond the antitrust issue.

2. Securities Regulation

A second United States law, enacted without serious consideration to foreign impact or foreign nation reaction, regulates securities trading.\(^2\)\(^5\) The extraterritorial reach of these laws has not generated the same hostility as the antitrust laws. Challenged activities have not tended to involve issues of the magnitude of antitrust conflicts such as, the uranium cartel disputes.\(^2\)\(^4\) There is no evidence, however, that United States courts or the President will be any more sensitive to the foreign reaction to securities laws than they have been with the antitrust laws. The antitrust and securities laws, enacted in pursuit of domestic goals, serve to illustrate a conflict-creating situation. They also reinforce the theory that nations hosting foreign direct investment should not rely on this form of home nation laws to assist in regulating multinational enterprises.

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1980, 75 AM. J. INT'L L. 257 (1981). Other nations, including France, Australia and New Zealand, have enacted similar protective national trade laws.


The provisions of this chapter or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter.

Id. § 78dd.

24. See Goldman & Magrino, Some Foreign Aspects of Securities Regulation: Towards a Reevaluation of Section 30(b) of the Securities Exchange Act of 1934, 55 VA. L. REV. 1015 (1969); Comment, From Schoenbaum to Scherk: The Continuing Question of Subject Matter Jurisdiction in an International Securities Transaction, 12 Hous. L. REV. 924 (1975). Recently, the extraterritorial effect was emphasized by the use of secret Swiss accounts to mask the identity of inside traders in the securities of United States corporations. The United States extracted an agreement from the Swiss to establish new banking rules allowing disclosure of the identity of persons using Swiss accounts for such purpose.
GOVERNANCE OF MULTINATIONALS

B. Laws Resolving International Conflicts

The second form of home nation laws, those with an extraterritorial affect which are passed to resolve current international trade conflicts, are illustrated by the anti-boycott laws and the Foreign Corrupt Practices Act. 26

1. Boycott Legislation

United States boycott legislation has political roots. The United States economic boycott of Cuba, 26 the withdrawal from the United Nations sanctioned boycott of Rhodesia, 27 and the anti-boycott laws directed to the Arab nations' actions against Israel, 28 show how laws governing the activities of multinationals abroad subordinate long-term interests of international trade to short-term political goals. These laws, however, are positively viewed by some host nations. Israel, for example, welcomed the boycott that was directed against the Arab nations. The United States' withdrawal from the Rhodesian sanctions similarly was viewed favorably by the Soviet Union. Although they directly addressed an international trade issue, they were not motivated to achieve a just pattern of international commerce, but were intended to achieve political aspirations of the United States.

2. Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act also was enacted in an effort to resolve an international conflict brought to public scrutiny

in 1976. Numerous disclosures by the Securities and Exchange Commission documented payments made by United States multinationals to persons holding high political offices in many developing nations. They included Japan, the Netherlands and Italy, as well as Honduras and many other small developing nations.29

The United States’ legislative reaction was primarily politically motivated, because several of the payments created distressing political imbalances in the industrialized nations with which the United States had long maintained most favorable relations, and destabilized some political parties the United States wished to preserve. Beyond the political motivations, the law also has an ethical foundation because bribes are not valued in our system as a way of doing business. They are discomforting to our notions of fair trading and viewed as a chronic development-retarding element in the third world. Thus, denying payments may diminish government corruption which severely retards development, by establishing a moral element in trade relationships which may not be shared abroad.

Other laws regulate foreign activities of multinational enterprises and encourage multinationals to invest in developing nations by providing advantages such as tax benefits. United States’ laws and those of other developed nations which assist development, however, generally are not in the form of the regulation of multinational enterprise activities. For example, the Generalized System of Preferences (GSP),30 and customs provisions allow for the estab-


lishment of foreign assembly industries to promote third world development, but they are relatively minor in magnitude and all directed less to the governance of multinational enterprises than to isolated issues of trade.31

A more thorough review of United States' laws affecting the activities of its multinationals in foreign nations would further show that those laws were designed to achieve domestic, economic, and political benefits. Only rarely or indirectly do they attempt to aid in the governance of multinational activities abroad so as to enhance development. Host nations, whether they are developed, socialist, or developing, should not rely on the home nations of multinational enterprises to regulate those entities in a manner perceived by a host nation to be suitable to the improvement of the quality of life. This should not suggest, however, that regulations enacted in the home nations of multinational enterprises should be viewed as counterproductive to development; rather they are just not motivated to serve foreign aspirations for development.

V. Governance by Multi-Nation Organizations—The Aspirational Declarations

A second tier of multinational governance consists of regulations by multi-nation organizations, although the adequacy of this type of regulation is questionable when directed at conduct in developing host nations. The principal multi-nation organization which has attempted to regulate multinationals is the United Nations. The United Nations and its subsidiary associations have had little success, however, in developing an effective, widely accepted regulatory scheme for the multinational enterprises. This should not be surprising as it is a large organization with extreme diversity of cultural, economic and political composition. That is as it


31. Two provisions of the United States tariff code and several Mexican laws and decrees have been the basis for extensive industry development in Mexican towns adjacent to the United States border. The tariff provisions were not enacted for the purpose of allowing the industry to develop. Rather, they evolved as part of the United States policy toward trade relationships with Mexico, and have received strong criticism from United States labor organizations claiming the tariffs encourage the transfer of jobs from the United States to Mexico. 19 U.S.C. § 1201 (1976). The Mexican laws are translated in 1 M. Gordon, Multinationals supra note 11, at B.5. See D. Baerresen, The Border Industrialization Program of Mexico (1971).
should be. However ideally conceived the United Nations may be
to govern multinationals objectively, the record to date has not
been impressive.

As in the case of regulation by home nations, the pronounce-
ments of the United Nations and other multi-nation organizations
which have a developing nation member dominance must not be
ignored. Their pronouncements are directed to how things "ought
to be" in the perspective of the developing sector of the world
community. These views represent an important element in the
framework of governance of multinational enterprises by host na-
tions. Emanating from a multi-nation organization, they neverthe-
less illustrate an aggregate response by developing and socialist na-
tions. They may be consistent with written and, more importantly,
unwritten, host nation laws and policies affecting foreign direct in-
vestment. While the policies of host nations often are not ex-
pressed in writing and are overlooked by leading multinational
representatives, they are written and disclosed in the pronounce-
ments of the multi-nation organizations.

Whether several of these United Nations pronouncements af-
fecting multinationals constitute international law is an important
issue that has become largely academic. Of greater importance is
their disclosure of the aspirations of the large majority of the de-
veloping and socialist members, and a few developed nations.

32. O. de Rivero, New Economic Order and International Development Law
(1980); Brower & Tepe, The Charter of Economic Rights and Duties of States: A Reflection
or Rejection of International Law? 9 INT'L L.J. 295 (1975); Garica-Amador, The Proposed
New International Economic Order: A New Approach to the Law Governing Nationaliza-
tion and Compensation, 12 LAW. AM. 1 (1980); Geiser, A New International Economic Or-
der: Its Impact on the Evolution of International Law (pt. IV), 9 ANNALS INT'L STUD. 97
(1978). Virally, La Charte des Droits et Devoirs Economiques des Etats, Notes des Lecture,

33. Whether socialist nations voted favorably for these declarations because they be-
lieved in the principles espoused, or because they wished to side with the developing nations
against the developed is not easy to discern. Many of the principles dealing with property
promulgated by these declarations, however, have long been supported in socialist legal the-
ory. The U.S.S.R. view has been that because states are sovereign in international law, the
laws of the state rather than international law must govern the taking of property from
private persons as well as all aspects of compensation. See generally G. Tunkin, Theory of
International Law (W. Butler trans. 1974); Vilkow, Nationalization and International
Law, 1960 SOVIET Y.B. INT'L L. 58. Developed nations which have supported these Aspira-
tional Declarations have done so for several reasons. These reasons include a commitment to
the concepts embodied in the declarations, or, in the absence of such commitment, a belief
that the nation could cultivate the goodwill of the socialist and developing nations by join-
ing with them while relying on other developed nations to oppose the Aspirational
Declarations.
cause they reflect the aspirations of these nations, this author refers to them as Aspirational Declarations.\textsuperscript{34} They are written, but not law.\textsuperscript{35}

The most important Aspirational Declarations are two General Assembly resolutions, the Declaration of Establishment of a New International Economic Order,\textsuperscript{36} and the Charter of Economic Rights and Duties of States.\textsuperscript{37} They are important because of their focus upon consequential areas of conflict between multinational enterprises and host nations, and because they were issued by the largest and most important multi-nation organization. Other Aspirational Declarations have come from smaller, third world and socialist nation-dominated political or economic associations. The aspirations of many of these nations have been presented by the Group of 77, those nations within the developing and socialist sphere which have generated the north-south dialogue. But the pronouncements of that group are frequently less aspirational than frustrational, often focusing on demands for a direct transfer of resources from the rich to the poor without restrictions.\textsuperscript{38} They are important, however, for they include within the transfer demand a greater flow of technology which largely is the property of multinational enterprises in the developed world. The Group of 77's As-

\textsuperscript{34} The term is neutral. To regard them as meaningless or vest them with excessive authority would render them practically useless. Only a neutral designation allows them to assume characteristics useful to both their supporters and detractors.

\textsuperscript{35} They are not law in the sense that a large number of important home and host nations would not view them as sources to which disputants on both sides would turn to seek a resolution of foreign direct investment conflicts. This does not mean that the regulatory framework proposed in this article is therefore subject to challenge, because the framework is designed to illustrate the positive elements of the declarations important to multinational representatives.


\textsuperscript{38} These demands would include the mandate that the developed world establish a $300 billion fund for developing nations to borrow from at favorable terms. The position of the Group of 77 is discussed in Garcia-Amador, \textit{The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation}, 12 LAW. AM. 1, 36 (1980).
Aspirational Declarations are less constructive than those of the United Nations and are therefore less likely to appear in either of the two classifications of multinational governance by host nation law described below.

Aspirational Declarations of a smaller scale are also important because they illustrate aspirations unhindered by negotiation in a larger forum, which includes developed nations, and the adversarial atmosphere of the United Nations. An example is the Treaty Project of the Central American Economic and Social Community, intended to be a basic document for restructuring the failed Central American Common Market. Provisions of the Treaty Project disclose that the aspirations of these Central American nations in governing multinationals extend much further than was evident in the treaty forming the Central American Common Market.

Aspirational Declarations have not been accepted as constituting international law by the developed nations. They are viewed as politically unrealistic and economically unfeasible, and they often challenge traditionally accepted concepts in the developed world of private ownership and norms of international law. Some declarations do not purport to be law, such as the Central American Treaty Project. Others, however, have their proponents who profess that declarations do constitute international law. Forceful though the arguments may be that some of these declarations constitute an evolving international law, there remains a conflict as to


40. The Treaty Project, which has 311 articles, includes several chapters affecting foreign investment, including provisions involving the treatment of foreign capital in Central America. The treaty obligates the members to adopt a common policy regarding the treatment of foreign capital and the enterprises in which it may participate. The provisions reflect the aspirations of the Central American countries to have greater local participation than may be realistically possible, considering the absence of adequate capital within Central America to undertake necessary development or even joint ventures with foreign enterprises. There is also little leverage in the smaller nations to dictate joint venture terms to foreign enterprises in all but a few industries.

41. See supra note 32. Tribunals in developed nations serving as fora to resolve conflicts involving multinationals, which raise issues addressed to these Aspirational Declarations, are unlikely to apply these declarations as law other than in exceptional circumstances. It is even less likely that the developed nations will allow a suit to commence in the International Court of Justice (assuming they have a jurisdictional reservation) if there is any prospect that the Court will either validate the legal status of these declarations or consider that their substance constitutes another source of international law.
what constitutes the contemporary framework of international law governing multinational enterprises. One observation may be accepted: that international law which governs multinationals is diminishing in quantity, or acceptability, or both. Thus, over time, while multinationals may be able to exist in a framework of greater restrictiveness, \textit{i.e.}, the Edge of Discouragement slopes upward, the usefulness of international law regretfully is in decline.

Aspirational Declarations assume particular importance \textit{not} because they may constitute international law but rather for what they disclose regarding current sentiments and possible future law. They create a norm of expected conduct, a moral code promoted by developing and socialist nations as proper and reasonable conduct for multinationals. But they are more than a moral code. They may be a precursor of customary international law or they may become part of the written or unwritten laws of specific host nations governing foreign investment. The laws and policies of several host nations share a close identity with Aspirational Declarations of multi-nation organizations.

Apart from indicators of future action, Aspirational Declarations serve another important function. They offer developing nations strong words which may temper adverse public reaction to governments plagued by economic political troubles. They may
serve, in a sense, as doctrines of collective insecurity. They are also a countervailing organizational participation for developing nations, symbolically offsetting trade associations dominated by developed world nations such as the World Bank, the Organization for Economic Cooperation and Development, the General Agreement on Tariffs and Trade, and the International Monetary Fund.\footnote{42}

Unsuccessful in gaining an effective voice in those organizations, multi-nation organizations issuing Aspirational Declarations allow the developing and socialist nations to dominate the discussions, counter-balance the developed nation organizations, and provide important fora from which to express their aspirations in the world trading community. Most importantly, Aspirational Declarations produce new ideas and concepts regarding directions of international trade. Although they do not dictate rules acceptable to the developed world, they do disclose goals to be pursued for decades to come.

On the graph, the Aspirational Declarations would belong above the older rules of international law now so criticized and rejected by socialist and developing nations. In addition, because they set goals much higher than multinationals accept, they belong above the Edge of Discouragement. If these declarations were the norm of regulation, most foreign direct investment would withdraw. The reluctance of host nations to incorporate these declarations into their domestic law, and the Operational Code's extreme variances from the concepts of the declarations also reinforces that they are more restrictive than is acceptable.

\footnote{42. United Nations representatives from many of the developing nations have urged the U.N. to use its facilities to influence these organizations. A United Nations General Assembly Resolution in November, 1982, with only the negative votes of the United States, Britain and West Germany, opposed an International Monetary Fund loan to South Africa. The IMF has a separate charter, although it is officially an affiliate of the United Nations. The charter places power in the IMF with the largest contributors, a position similar to that in the GATT. Third world challenges to these institutions assume a risk. Were power within these organizations to shift to the third world, it is quite predictable that the major contributors would reduce their participation, and create a new organization among the major developed nations to deal with the issues traditionally negotiated in the IMF and the GATT. See Some U.N. Leaders Push to Control IMF as Part of Plan for 'New Economic Order', Wall St. J., Nov. 18, 1982, at 34, col. 1.}
VI. Governance by the Host Nation

A. The Public Code

If one is asked how multinationals are governed, the common response is to concentrate exclusively on those written laws of the host nations which directly or indirectly regulate foreign direct investment. This is the second level of governance, which will be referred to as the Public Code. This code is written and it is law, in contrast to the Aspirational Declarations, which are written but

43. The word *code* as opposed to *law* is used to avoid confusion with the numerous meanings attached to the term “public law.” The use of the word “public” is to emphasize the broad distribution of this category of rules. Availability to the public is an important element of the definition. Sometimes laws are enacted which are not disclosed to the public, a group which forms part of what is discussed below under the label of the Operational Code.
are not law. A nation's Public Code includes constitutional provisions affecting direct foreign investment (such as labor and social security rules), statutes, published administrative regulations and widely distributed regulations or decisions of foreign investment agencies.

Examples of the Public Code in three developing nations from different parts of the world, and a socialist nation, should identify the type of written laws most commonly governing foreign direct investment. The first developing nation, Mexico, includes in its regulatory scheme three general investment laws: the Investment Law,44 the Transfer of Technology Law,45 and the Inventions and Tradenames Law.46 It further includes specific industry laws, such as the Automotive Industry Decree, and the Mining Law,47 as well as several special topic laws such as the provisions affecting the border assembly industries,48 and export promotion or decentralization laws.49

While the Mexican Public Code governing foreign direct investment is one of the most detailed, many other third world nations have foreign investment laws which provide the basic Public

48. The border zone is governed by the United States Tariff Code, Items 806.30 and 807.00, the Mexican Customs Code, art. 321, and a series of Mexican decrees providing for special incentives to do business in that zone. These provisions are contained in 1 M. Gordon, Multinationals, supra note 11, at B.5.
49. The 1979-82 National Industrial Development Plan provided a framework for offering export promotion and decentralization incentives. An abridged version of the plan and several decrees are included in 1 M. Gordon, Multinationals, supra note 11, at B.4.
Code framework. The Indian Foreign Exchange Registration Act encompasses some elements of the Mexican Investment Law and Transfer of Technology Law. Nigeria has a similar arrangement in its Enterprises Promotion Decree, which contains schedules outlining different types of ownership classifications requiring total Nigerian ownership, Nigerian majority interest and majority foreign interest.

Yugoslavia has been a leader in the development of joint venture legislation in the socialist nations. Its initial 1973 law resulted in numerous investment ventures. Other East European nations also altered their Public Codes to allow joint ventures in the early 1970s, followed by the more recent laws in China and Cuba.

A nation's Public Code often includes one general investment law theoretically applicable to all foreign direct investment. In actuality, very large investments, particularly extractive mining, petroleum or petrochemical enterprises, emerge from direct contractual arrangements with the host government. The pattern among nations is inconsistent. In one nation there may only be one general investment law and no specific industry laws. Another nation may have both a general investment law and specific industry laws.

Many dependent nations, which rarely possess the leverage to enforce a general investment law similar to those present in the advanced developing countries and the socialist nations, nevertheless may have specific industry laws. These industry laws, usually

52. Nigeria may not yet qualify as an advanced developing nation. Its law may be too restrictive in contrast to the leverage possessed by the government to attract foreign direct investment in the quantity needed for rapid growth.
53. The initial Yugoslav law on foreign investment was enacted in 1968. A new law was enacted in 1973, and the current law was adopted in 1978. See Law on Investment of Foreign Resources in Domestic Organizations of Associated Labor, Sluzbeni list SFRJ, No. 40/78, July 14, 1978 [hereinafter cited as Yugoslav Joint Venture Law].
54. See supra notes 5-9.
addressed to the most important primary commodity production, may mark the early development of a restrictive Public Code in the small dependent nations. But again the pattern is inconsistent. Some dependent nations choose to contractually negotiate each major investment, without relying on either a general investment law or a law governing the specific industry.

Exceptionally large projects in even the most advanced developing countries may also be governed by a special contract negotiated with and approved by the government instead of specific industry laws or a general investment law. The Jari project of Mr. Daniel Ludwig, for example, was negotiated directly with the Brazilian Government. It was too large and complex to be regulated effectively by the Brazilian Investment Law of 1962. Even where a nation has both a general investment law and a specific industry law, any project of an exceptional magnitude for the country is likely to be treated as sui generis, with many elements of the in-

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56. Investment incentive laws usually precede the adoption of specific industry laws in these dependent nations. Incentive laws are designed to encourage the entry of foreign investment, and usually include comparatively little regulation of that industry. The specific industry laws are often the first laws adopted to commence a pattern of restricting or regulating invited foreign investment.

57. The reasons for independent negotiation of each major investment may be diverse. The nation may possess newly discovered resources, and negotiate the exploitation of those resources before there has been time to draft and implement a specific industry law; or the resources may be so concentrated as to suggest only a single investment in one industry, tending to negate the feasibility of enacting a formal Public Code governing structure when only one foreign investor will participate; or there may be cultural reasons. For example, the Chinese law permitting joint ventures received adverse criticism leveled not at what it included, but at what it omitted. In contrast to joint venture laws of socialist nations in Eastern Europe, the Chinese law appeared to overlook provisions governing much of the investment relationship. Potential investors misunderstood the cultural impact of China on the enactment of laws. Much is left to negotiation. China does not have an extensively codified legal system. But, sensing the uncertainty created by their brief joint venture law, the Chinese authorities added to the regulatory framework of the Public Code additional provisions which markedly increased foreign investor interest.

58. The Ludwig Group Enterprises, traceable to two parent corporations in Bermuda (Universal Tankships, Inc.) and Liberia (Seetankers, Inc.), involves a complex corporate structure with at least ten Brazilian enterprises which participated in various aspects of the Amazon project. But the project suffered one of the endemic diseases of massive, extractive industries; it became a focal point of nationalism and was taken over by Brazilians in 1982. See 1982 BUS. LAT. AM. 42 (Feb. 10); 1981 BUS. LAT. AM. 59 (Feb. 25); 1981 BUS. LAT. AM. 309 (Sept. 30). See also Law No. 4,131 of Sept. 3, 1962, as modified by Law No. 4,390 of Aug. 29, 1964. The Operational Code in Brazil is no less complex. See Rosenn, Treatment of the Foreign Investor: The Brazilian Style, THE FUTURE OF BRAZIL 245 (W. Overholt ed. 1973); Rosenn, Trends in Brazilian Regulation of Business, 13 LAW. AM. 169 (1981); Rowland, Foreign Investment in Brazil: A Reconciliation of Perspectives, 14 J. INT'L L. & ECON. 39 (1979).
vestment negotiated directly with the government.

Foreign investors proposing a project of exceptional size do gain some insight from reading the Public Code. It affords a basic outline of how a country treats foreign investment. Also, attention to general principles drawn from the Operational Code will aid multinationals in determining how they are expected to conduct their investments. Still, the investment will most likely be the result of a negotiated contract. There are benefits to a negotiated contract in that the company and government are likely to deal with questions that are not often discussed when the investment begins through registration and approval of only limited elements of the investment.

In the socialist nations a government contract initiates all direct investment, instead of a Western-type organization and registration of a corporation. Western biased assumptions, which may prove erroneous, cannot be made when no corporation, as known in the West, exists. Instead the entity is a unique creation of the economic law of the socialist nation. Resolution of questions in the contract reduces not only the likelihood of surprise and consequent embarrassment, but more importantly, it lessens the possibility of serious harmful economic consequences at a later time. This is the reason for the favorable references by Western investors to the "negative surprise ratio" in Eastern Europe.

Many Public Code laws overlook the needs of small and medium size investments, and are not very useful for large investments which are governed by direct contracts with the government. The complexity of the Public Code is not what usually discourages small and medium size investment. It is more often that these investors are unable to comprehend and find their way through the labyrinth of the Operational Code.

Although a nation's Public Code governing foreign direct investment may be extensive, it serves as the basis—the mental framework—of regulation of foreign direct investment for that developing nation. But even in those nations which have an extensive Public Code, multinational advisors should not rely on that written law as constituting the total framework of investment regulation. Awareness of the Operational Code is necessary, as is awareness of any impact that the nation's participation in Aspirational Declarations would have on the functioning of both the Operational and Public Codes.
The Public Codes in several developing and socialist nations illustrate the diversity of development modes adopted by these nations. Multinationals frequently initiate foreign direct investment activity by entering a single, comparatively safe developing nation and assuming that the framework of regulation in that nation constitutes a norm of regulation for other nations at a similar level of development. It is an assumption which may cause the multinational substantial confusion and economic distress when it enters other nations possessing very different attitudes toward the governance of foreign investment.

A multinational entering Mexico and referring to its Public Code, as well as a history of the Mexican attitude toward foreign investment, will note a framework with a comparatively high degree of restrictiveness toward the entry and operation of a foreign direct investment. Until recent currency regulations were passed, there was at least some relative freedom of exchange of profits from local to foreign currencies, with repatriation to the parent home office. In contrast, the Brazilian foreign investment law and attitude toward initiating foreign direct investment over the last few decades has been less restrictive, if measured by the Public Code. Brazil, however, has been particularly restrictive in regulating currency.

Little research has been conducted on how initial foreign investments of multinational enterprises affect their attitude toward expanding investment to other nations. Nonetheless, the order in which multinationals enter different developing and socialist countries having markedly different attitudes toward foreign investment undoubtedly affects their decisions about future investments. Both the Aspirational Declarations and the Public Code serve to placate public demand for a strong national posture regarding foreign investment. Actual investment decisions of the national governing elite, however, often occur in the shadow, effectuated through the Operational Code. The public believes there is certainty to the law and the government is able to legislate unrealistic, restrictive measures towards multinationals. The government is able to deal pragmatically with individual foreign direct invest-

60. See generally Rosenn, supra note 13.
ments through effective escape valves in the Public Code\textsuperscript{61} and the nonpublic functioning of the Operational Code.

Placing the Public Code on our graph creates some difficulty because the graph generally applies to foreign direct investment in developing and socialist nations. Conclusions drawn as to the plotting of the restrictiveness over time are limited to an increasing degree of restrictiveness, or an upward sloping line, because Public Codes differ from nation to nation. It is preferable to show this line not as a constantly increasing line but one which increases in abrupt increments. Elements of the Public Code are enacted periodically, usually when the Operational Code has become so cumbersome and confusing that it is necessary to transfer some elements to the Public Code. This reduces investor confusion and increases predictability for those investors only familiar with the Public Code.

The step used on the graph illustrates an upward movement at various stages in time. The line obviously is below the Edge of Discouragement and, therefore, below the Aspirational Declarations line. The relationship of the Public Code line to the diminishing content of international law is more difficult in that the latter is not intended to be compared in its degree of restrictiveness with the Public Code, but to indicate that the quantum of interna-

\textsuperscript{61} The earlier Mexican Transfer of Technology law placed severe restrictions on the type and means of admittance of technology into Mexico. 1972 Mexican Transfer of Technology Law, \textit{supra} note 45, art. 7, D.O., Dec. 30, 1972, \textit{translated} in 1 M. Gordon, \textit{Multinationals}, \textit{supra} note 11, at B.2b. An exception was allowed where the technology was "of special interest to the country." \textit{Id.}, art. 8. Several of the restrictions, however, were not subject to the exception. \textit{Id.} This suggested that waivers were not given for any of those restrictions, or that a separate Operational Code existed which required a greater quid pro quo than that required for the granting of an ordinary exception. The current 1981 law retains the exceptions, but deletes the provisions that limit them. D.O., Jan. 11, 1982, \textit{translated} in 1 M. Gordon, \textit{Multinationals}, \textit{supra} note 11, at B.2b. The Nigerian Enterprises Promotion Decree contains a provision with the potential for creation of a broad Operational Code. The government is permitted to alter the lists of enterprises which state in three schedules which enterprises are reserved exclusively for Nigerians, which must be at least 60\% or more owned by Nigerians, and which require at least 40\% or more to be Nigerian. The government may vary some of the minimum Nigerian ownership percentage figures in the law, and it may even "make such different provisions in relation to different enterprises or as respects different areas of the Federations, and impose such terms as he [Commissioner of Nigerian Enterprises Promotion Board] may deem necessary." Nigerian Investment Law, \textit{supra} note 51, at art. 16.

The Yugoslav law is more detailed in its governance of the limited foreign equity participation in direct investment allowed in Yugoslavia. But it does contain exception provisions. A joint venture agreement may be approved even if it does not increase exports, if "such contract is likely to contribute to the faster development of the economic branch or activity concerned." Yugoslav Joint Venture Law, \textit{supra} note 53, at art. 42.
tional law governing multinationals is diminishing over time. The addition of the Public Code line to the graph results in a more complete picture of the governance of multinational enterprises.

Fig. 4

B. The Operational Code

A nation may have a restrictive Public Code, but with a lenient Operational Code it may be more receptive to foreign direct investment than another nation with a lenient Public Code and strict Operational Code. One must understand both. Functioning solely from the Public Code will create expectations which the Operational Code will soon dispel.

The Operational Code, the third control level, is the pivotal concept for multinational enterprises to understand. It is important largely because it is not written, or where written is not publicly disclosed. Indeed, by definition it may not be publicly disclosed. When elements of the Operational Code become so well-known to the investing community and are no longer considered secret, these elements tend to assume the status of the Public Code, yet remain unwritten. There is consequently a small part of the Public Code which is not formally written. But it is likely to become part of the Public Code in its next revision. Nevertheless,
the government may continue to deny its existence in the face of overwhelming public acknowledgment of its existence.

The definition of the Operational Code suggests that it is limited to formal unwritten regulations and decisions, but it may also include formal written regulations and decisions which either are not publicly available or discoverable. Two examples of written elements of the Operational Code illustrate this point. The National Commission on Foreign Investment in Mexico reviews petitions from foreign investors requesting exceptions from the Mexican Investment Law.\(^6^2\) A company may request a waiver from the requirement of Mexicanization to allow it to expand its current production at a new location or begin production of new products. Both, without being granted an exception, require Mexicanization of the entire company.\(^6^3\)

The Commission's written decisions are not released to the public, but they disclose a great deal about the Operational Code and the criteria the government applies in reaching decisions on these petitions. Over time, these decisions are obtained by some of the Mexican lawyers representing multinationals and their release eventually will become so extensive they will be common knowledge.\(^6^4\) They will then no longer be part of the Operational Code but will be transformed by the extent of the public knowledge to the Public Code. These decisions are already written and constitute pronouncements of an entity with decisionmaking authority, therefore, there is no need to pass through the formal legislative process to become part of the Public Code. When the Public Code is next revised, these concepts may be integrated into the investment regulation laws.

In contrast to formerly non-disclosed pronouncements, there are regulations issued by various ministries which have not been kept secret. Although technically part of the Public Code, they exist in such large numbers and are so difficult to locate that they must be considered part of the Operational Code. Brazilian lawyers deal with such rules in the form of what are known as "drawer" regulations. These are regulations which have been issued by various ministries which, even though not labeled secret, have not been publicly disseminated. They are kept in a ministry official's

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64. Mexican Investment Law, supra note 44, art. 12. See, e.g., supra note 63.
drawer, removed on one occasion, and left in the drawer on another. Even when a drawer regulation is noted by the official it may be applied with an inconsistency permitted by the lack of public disclosure. Both the Mexican Commission decisions and these Brazilian regulations may be considered part of the Operational Code, although they are in fact written decisions and regulations.

The Operational Code is always somewhat at variance with the Public Code, but it must not deviate from the Public Code so extensively that it generates so much uncertainty that it reduces foreign investor confidence in the regulatory structure. The Operational Code directly conflicts with the Public Code when, although positive law provisions of the Public Code do not contain exceptions, the law is waived according to the Operational Code. Any such waiver would be an Operational Code provision directly contrary to written law which would constitute a serious source of misunderstanding for potential foreign investors. This would be a far more serious problem than where a sizeable variance exists between the Codes only in an indirect form. A direct conflict with the Public Code may lead to litigation against a host country over the Operational Code.

An indirect variance exists when positive statements of the Public Code are conditioned by exception provisions, but the government so routinely grants exceptions that the positive law effectively becomes a nullity. It is a potential source of conflict because unknowing foreign investors may believe the Public Code to be routinely applied. If the variance between the Operational Code and Public Code becomes extreme, it is mandatory, and in the best interest of a nation, that it pass a new investment law. The new law should add to the Public Code those elements of the Operational Code the government wishes to acknowledge as now being appropriately part of the Public Code and those which it believes create unacceptable conflicts by remaining within the Operational Code. The government will still not acknowledge Operational Code provisions it does not want admitted to the public. For example, Operational Code requirements mandating payments to government officials to expedite services, granting exceptions, or even refusing to enforce the Public Code, are not appropriate subjects to publicly acknowledge, and thus remain perpetually hidden in the Operational Code.

During the 1950s and 1960s the Mexican government imposed
the equity joint venture form of investment upon many foreign investors through the Operational Code. Foreign investors, expecting to own one hundred percent of their subsidiaries in Mexico under the Public Code, were often unable to initiate an investment unless in the joint venture form. The Emergency Decree of 1944 required joint ventures in certain areas of activities, but the Decree was rescinded by the termination of emergency powers at the end of World War II. In spite of the rescission, the government continued to require the establishment of joint ventures on the basis of the Emergency Decree. When challenged, the Mexican Supreme Court ruled the Decree no longer in effect. If many more challenges had been made to the Emergency Decree, the Mexican government would have enacted an investment law much sooner than 1973, and would have incorporated the Operational Code mandate of the joint venture. It was a mandate which nearly all multinationals respected: either accept the joint venture or obtain an exemption. While a new law might offer some predictability regarding joint ventures, it also might add new restrictive provisions which multinationals rarely wish to promote.

In the 1950s, the Mexican government began to issue Mixed Ministerial Commission decisions. They constituted regulations of foreign investment, but were not publicly available. They were released to lawyers over the next decade, however, much in the fashion of the decisions of the National Commission on Foreign Investment. In the 1960s, the Mixed Ministerial Commission’s decisions became publicly known and published in a treatise on foreign investment law. There was substantial confusion on the part

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67. See Quimica Industrial de Monterrey, S.A., Corte Suprema de Justicia de México (Segunda Sala), Sept. 20, 1962. 66 Seminario Judicial: Sexta Época 25 (1963). The challenges were directed at the Operational Code; the Mexican government used the Emergency Decree to justify its restrictive action.
68. The directives were mimeographed but never issued to the public. They are discussed in Gordon, The Joint Venture as an Institution for Mexican Development: A Legislative History, 1978 Ariz. St. L.J. 173.
of multinational advisors operating in Mexico in the late 1960s, as to the applicable law governing foreign investment, because the Operational Code had become the major element of governance of multinationals. There was no general investment law and little that could be labeled the Public Code. Many multinationals not familiar with the Operational Code shied away from investments in Mexico because of the lack of predictability.

In 1972 and 1973 Mexico passed its Transfer of Technology Law and Investment Law.\textsuperscript{70} Not surprisingly, the issuance of those laws brought forth comments that the rules of the game had changed.\textsuperscript{71} But they had not been significantly altered. Through these newly written laws, the Mexican government had incorporated much of the Operational Code into the Public Code. This was understood by many foreign investors, but it created confusion for others, especially many medium and smaller firms which decided not to invest in Mexico because of the uncertainties of the written regulatory framework.

To place the Operational Code in the graph it must be emphasized that Operational Codes by their nature are not well defined. But for a general representation the line should relate to the Public Code and move upwards without the abrupt steps of the Public Code since the Operational Code is constantly undergoing modification.

It is as important for a host nation government to be aware of the divergence of its Operational Code from the Public Code, as it is for multinationals to be aware of that divergence and the progressively changing content of the Operational Code. A company failing to appreciate these movements is not in a secure position to predict future movements if it is ignorant of the existence of the Operational Code and the degree to which it varies from the Public Code. In some cases, particularly in the small dependent nations, the government tries to maintain a narrow gap between the Public Code and the Operational Code. If a dominant multinational enterprise in that nation is able to influence the Operational Code, it may function according to a lenient Operational Code but defend its actions on the basis of the more restrictive Public Code. The

\textsuperscript{70} See supra notes 44-45.

\textsuperscript{71} United States Ambassador to Mexico Robert H. McBride stated: "Many [investors] are unclear as to whether or not foreign investment is still desired [in Mexico] and whether the rules of the game are changing, not only for new investment but also for established firms." Miami Herald, Jan. 21, 1973, at 21-G, col. 1.
Aspirational Declarations

Edge of Discouragement

Operational Code

Public Code

Degree of Restrictiveness

Time

Fig. 5

graph of such a nation would show a more restrictive Public Code than the Operational Code (at least for the dominant investor).

There may be a benefit to the nation because it limits the single, dominant multinational to benefiting from the lenient Operational Code and enforces the more restrictive Public Code for other new

72. But in some dependent nations, the government has been able to narrow the gap between a lenient Operational Code and a strict Public Code, after the foreign investor has made a large capital investment in the country. The enterprise is then more susceptible to pressures to alter its investment to make it more favorable to the country. This process may create a tense relationship in that both parties realize the country is relying on the single commodity for much of its gross national product. The government wants to extract maximum benefit for the nation, without causing the multinational to withdraw, while the multinational argues that it is always on the brink of losses, and any further restrictions would lead to its withdrawal. Often there is no Public Code in a dependent nation other than investment incentive laws directed to less dominant industries. The relationship between the nation and a dominant industry may be the subject of a contractual agreement rather than the Public Code, or it may be governed by a specific industry law, which means there is a Public Code for that industry. One is then able to create a graph of the scheme of regulation for that particular industry.
investments.

The Operational Code has numerous facets. It has different rules applicable to multinationals with different levels of power to demand a lenient Operational Code. It reflects the nation's need to be flexible so as to obtain investment, particularly in crucial areas. The Operational Code under which IBM functions in many nations, where its computer technology has a monopoly position and where such a monopoly is of critical need to development, is in stark contrast to the Operational Code applicable to a multinational entering an industry saturated by domestic-owned enterprises. The Operational Code applicable to IBM may be less restrictive than the Public Code, while that applicable to the latter multinational may be so severely restrictive that it works to eliminate foreign direct investment which will compete with inefficient local industry.

The Operational Code occupies an important position in a host nation's governance of foreign direct investment because it allows the government to unequally treat multinational enterprises. An investor with leverage may be able to enter without accepting a joint venture with majority host nation equity, but other enterprises, even those manufacturing similar products, may be required to comply with a Public Code mandating the joint ventures. More important than permitting unequal treatment, however; is that a potentially unpopular, flexible, Operational Code, is hidden from public criticism. Nationalistic pressures may have caused the enactment of a restrictive Public Code for foreign investment. Consequently, the public is permitted to think nationally while the government is able to function pragmatically.

There is an interrelationship between the Operational Code and Aspirational Declarations. While Aspirational Declarations have infrequently become part of Public Codes, these aspirations often are tested within the Operational Code. They tend not to become part of the Public Code because they are severely restrictive, likely to discourage foreign direct investment, and force multinationals to seek alternative host nations without severe Public Codes. The Operational Code may serve as a substitute to a restrictive Public Code so that the country may be restrictive in mandating conduct of foreign direct investment in accordance with norms established in Aspirational Declarations, while maintaining a foreign investment profile as a receptive location for less restricted foreign investment.
Additionally, the Operational Code may permit a nation to impose factors in making foreign investment decisions beyond the scope of economics, such as denying permission for a proposed investment for cultural reasons, or because of concern for the impact of the investment on the political structure. One example involves the Kentucky Fried Chicken enterprise in Mexico. The company applied to the National Commission on Foreign Investment for permission to add new franchise outlets in Mexico without altering the wholly foreign owned status of the investment. The request was denied. The reasons, though briefly stated, indicated that the government believed there was already adequate service of chicken in restaurants in Mexico, a reason directly consistent with the Investment Law. The Commission, however, also alluded to the fact that it questioned the desirability of additional chicken preparation in Mexico based on a foreign style of cooking, illustrating the concern for the cultural impact. It was consistent with Aspirational Declarations which suggest that multinationals should respect social and cultural norms in the developing nations in which they invest.

Hence, the Operational Code provides a location for a host nation to hide decisions based on norms contained in Aspirational Declarations but which have not yet been made a part of the Public Code.

The Operational Code concept is not new. There is evidence that the harsh measures of the Code of Hammurabi of the Babylonian Empire were not as severely applied in actual practice. Ro-
man law contained extensive Operational Code concepts in conflict with written rules of law.\textsuperscript{77} In every society there is a variance between the Public Code and "the way things work."\textsuperscript{78} The Operational Code, however, should not be assumed to be the exclusive device of developing economies or socialist nations. Operational Codes exist in the most developed of economies, although they tend to vary less with the Public Code than in the former nations. The often extreme degree of variance between the Operational Code and the Public Code in developing nations cannot be considered to enhance development. Combined with an Operational Code which contains a large number of inconsistencies, it is understandable that most prospective foreign direct investment is turned away.

VII. THE INTERRELATIONSHIP OF THE THREE-TIERS OF GOVERNANCE

It should be useful to consider several areas involving foreign direct investment and to comment on their interrelationship with the three control levels. Such comparison will illustrate how different levels of control are used to respond to the impact of multinational enterprises on political, economic, social, and cultural institutions. Each subject matter will not necessarily be reflected on all three control levels, and in a given case there may be no Aspira-

\textsuperscript{77} The major division of the Roman law was the \textit{ius civile}, the law for citizens, and the \textit{ius gentium}, the law for all others. Before the development of the \textit{ius gentium}, the foreigner was strictly a person without status or property. He and his property could be seized as items without any owner. He could not enter court to sue for he had no standing. Jolowicz and Nicholas doubt, however, that this was true in practice. See H. Jolowicz & B. Nicholas, Historical Introduction to the Study of Roman Law 102 (1972).

\textsuperscript{78} Gandhi wrote of pre-British India: [T]here was not such a thing as rigid Hindu Law governing the lives of millions. The body of regulations known as Smritis were indicative rather than inflexible codes of conduct. They never had the validity of law such as is known to modern lawyers. The observance of the restraints of the Smritis was enforced more by social than legal sanctions. The Smritis were, as is evident from the self-contradictory verses to be found in them, continually passing, like ourselves, through evolutionary changes, and were adapted to the new discoveries that were being made in social science.

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An Aspirational Declaration that suggests a large measure of restrictiveness and an Operational Code disclosing a very lenient attitude may exist in either a dependent or an advanced developing country. In the small dependent nation the Operational Code may be lenient in its application to all investment. In the larger advanced developing country it may reflect a specific large and needed foreign direct investment, and a less restrictive form of the Operational Code applied to that particular enterprise.

Examples of economic relations and the interrelationship of the three control levels reflect the influence of foreign direct investment at the point of entry, during operation, and at voluntary or involuntary withdrawal. Much attention has focused on how foreign direct investment is permitted to enter a nation. Not surprisingly, nations prefer to have a large percentage of the means of production and distribution in the hands of nationals. But Aspirational Declarations have not suggested total ownership and control over the means of production and distribution. The non-industrialized world accepts that industrialization will occur only, or more rapidly, with the assistance of the developed world through the participation of foreign direct investment.

Total ownership and control might be achieved through the exclusion of any foreign direct equity investments, relying for development solely on the import and export of goods, the receipt of technology through the licensing agreements, and the development of turnkey and cooperation concepts familiar in the socialist nations. But this is not believed sufficient to achieve an adequate base of industrialization. The socialist nations in the last decade have begun to admit equity foreign direct investment in the form of joint ventures. Marxist theory includes numerous Aspirational Declarations including that ownership of the means of production and distribution is to be in the workers’ hands. Joint venture legislation has been adopted in Eastern European nations that recognize the inconsistency of the joint venture with Marxist theory, justifying the variance on pragmatic grounds of more rapid development by a temporary allowance of an anti-Marxist element.

Once the Aspirational Declaration is formed, the Public and
Operational Codes complete a clear framework. For example, the Public Code in many nations mandates varying levels of ownership and control by host country nationals. The Mexican, Nigerian and Indian Public Codes require joint ventures in nearly all areas in which foreign investment is permitted. Characteristically, Operational Codes directed to the amount of permitted foreign direct investment vary widely. In nations with restrictive Public Codes, including Mexico, Nigeria and India, the Operational Codes appear to function inconsistently with investment laws by admitting wholly foreign owned investments.

A foreign investment which might be limited to a minority position may receive permission to retain a majority or even total foreign ownership if it satisfies the Operational Code criteria. Such criteria include location in either a decentralized or high unemployment zone, a guaranteed level of exports or an assurance that exports will equal or exceed imports, and, perhaps most important, the introduction of needed technology not otherwise attainable. There is a distinct trend toward focusing upon the receipt of technology under terms quite different from former periods. The Operational Code may allow an investment otherwise excluded if it brings a technology considered critical for development, or if the enterprise agrees to establish research facilities in the nation for the production of technology to be shared by the government.

The Mexican Investment Law prohibits foreign direct investment which does not have at least 51 percent local ownership. Investment is placed in one of three groups: sectors reserved exclusively for state ownership, sectors reserved exclusively for Mexicans or Mexican companies, and sectors in which foreign investment is permitted, but limited to 49 percent. Mexican Investment Law, supra note 44, at arts. 4-5. Nigeria also classifies enterprises. See supra note 61. India limits all firms to a maximum of 40 percent foreign participation, but allows up to 74 percent in some firms which are export oriented, and provide a source of technology which India has yet to acquire. India Foreign Exchange Regulation Act. Foreign investment laws in socialist nations do not include the various classifications as noted in the laws of Mexico, Nigeria and India. Socialist nations function from the premise that all means of production and distribution must be state owned (worker owned in Yugoslavia). Consequently, there is no need to express classifications dividing certain industries between those exclusively reserved for state ownership and ownership by nationals or foreigners. The socialist nations have not listed those industries in which they will permit limited foreign direct investment. They prefer to listen to proposals for investment in nearly any area of activity which will add modern technology, increase exports, improve the supply of goods to the domestic market, and promote development.

One current method employed to obtain permission from the Mexican authorities for a wholly foreign owned investment is to establish a research facility in Mexico. This method is referred to by Mexican lawyers as the "Mexicanization" of technology and is an indication of the considerable interest of the third world in acquiring more and better technology through the Operational Code.
There is an identifiable and predictable pattern in the three control levels with regard to the entry of foreign direct investment. Aspirational Declarations suggest a severely restrictive attitude toward foreign participation. But there is a discernable mix of foreign involvement in the actual Public Codes: a pragmatic Operational Code recognizes that Aspirational Declarations and overly restrictive Public Codes must be sufficiently tempered to assure access to industrialized nations' technology and to achieve some balance in imports and exports which diminishes severe dislocations in a nation's balance of trade.

Our graph for the entry of foreign investment may differ from figure 5, which is the general view of the control levels in developing nations. Where nations have restrictive entry provisions, they may have an Operational Code line below the Public Code line. This is consistent with the view that a strict Public Code is good for local consumption—the multinationals are strictly regulated—and it allows the government to come to terms with realis-
tic conditions of entry. Thus, the graph for entry to nations with restrictive Public Codes might appear quite differently.

A second sphere of foreign direct investment which illustrates the variation in the three control levels is the amount of participation in management of the business. It is related to the percentage of ownership issue, for the majority owner usually has at least majority control over management. Many developing nations' representatives initially assume that achieving a status of majority local ownership will result in local control of management. Thus, investment laws do not always include provisions governing the constitution of the managing board.

The Mexican Investment Law addresses this issue and provides that "participation of foreign investment in the administration of the business enterprise may not exceed its participation in the capital." Even with the adoption of such provisions in Public Codes, however, the Aspirational Declarations for this area have not been reached. Private investors appoint persons to management boards who are trained in business management, and have goals similar to their own. Their nationality may not be important but one important contrast in goals may be a concern of host nation directors about decisions affecting the continued existence of the firm in the country. It is not very likely that Nigerian participants on the board of a Nigerian subsidiary of an English parent would recommend the subsidiary be closed down or removed to a nation more receptive to foreign direct investment.

In the majority of cases, host nations have viewed laws mandating majority participation in the administration as beneficial to the development of a skilled national sector of business administrators. If Aspirational Declarations suggest total governance by host nation administrators, it has been diminished in Operational Codes by the same attitude affecting mandatory levels of equity. Management know-how is often as much an element of advanced technology as a patent. Thus, host nations in their Public Codes may mandate a majority of their nationals as directors but tend to be wary of any effect the policy may have to diminish the receipt of technology by the parent, as well as lessen its ability to achieve a competitive level. A country will also want to receive other benefits a board composed solely of nationals might not achieve, or a board with a majority of nationals might lose by rejecting the ad-

81. Mexican Investment Law, supra note 44, at art. 5(c).
vice of the foreign minority. The Operational Code, consequently, may allow the foreign minority to govern the enterprise, or allow a similar diversion of management decisions from a local board to the foreign parent through the use of a management contract. Thus, the Public Code would place nationals on the board, but the Operational Code would allow many major decisions to be decided by the minority foreign participants.

An area of substantial conflict between developing nations and multinationals involves a forced alteration of ownership by the host nation. Whether it takes the form of a one-time directive or of a creeping nationalization, it has resulted in serious conflicts over the compensation of the affected enterprise. The Aspirational Declarations are clear in this area. The Declaration of the Establishment of a New International Economic Order stipulates "full permanent sovereignty of every State over its natural resources and all economic activities,"\(^8\) and indicates a state has the "right to nationalization or transfer of ownership to its nationals."\(^8\) The same theory is included in the Charter of Economic Rights and Duties of States, which also addresses choice of laws with respect to compensation. The Charter states that "appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations in all circumstances that the State considers pertinent."\(^4\) The provision further indicates that questions of compensation are to be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.\(^5\)

The international community of the developed world has long thought that international law applied to such nationalizations, and that international standards mandated prompt, adequate and effective compensation as determined by an international rather than a domestic tribunal. To argue that provisions of the Charter constitute a new international law only generates the same dispute in reverse. It does seem clear, however, that whatever might have been international law in the past, should hardly be viewed as ei-

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82. Declaration of a NIEO, supra note 36, art. 4(e), at 799-800.
83. Id.
84. Charter on Economic Rights, supra note 37, at art. 2(c).
85. Id.
ther generally accepted throughout the world community or as very useful for the resolution of disputes.

The Public Codes of host nations have varied in dealing with nationalization. Mexico addressed the issue after its 1910-1917 Revolution, most expressively, by the expropriation of foreign oil interests in 1938. The Mexican position was clear: the Public Code provided for compensation according to Mexican law and as determined by Mexican courts. Few nations, however, have a Public Code as close to the Aspirational Declaration as did Mexico. Mexico's position, expressed in correspondence immediately after the 1938 expropriations, was never again included in congressionally issued legislation.

It is not unusual to find an investment law provision of a market economy developing nation which requires compensation for nationalization. The provision may even require compensation to be paid before, at the time of, or promptly after, the nationalization. Such legislation is enacted by regimes trying to establish a climate receptive to foreign direct investment. But many of the most notable and large-scale nationalizations have occurred subsequent to a major change in government, often the result of a revolution, a military takeover of a civilian government or a popular civilian election replacing a military government. New laws are adopted which, although usually providing for compensation, may add elements which effectively negate even the possibility of such payment.

Aspirational Declarations in the area of the entry of foreign direct investment tend to be undefined, while the Public Codes are carefully constructed around a joint venture requirement. This


87. Correspondence between Mexico and the United States outlining the different positions of the two countries and the resolution of the issue is contained in 3 G. Hackworth, Digest of International Law 655-65 (1942); XIX U.S. Department of State Press Releases 50, 136, 139, 165 (1938).

88. Few nationalizations have reached the dimension of those following the Cuban revolution. For a discussion of the Cuban expropriations as a specific case study, see M. Gordon, The Cuban Nationalizations: The Demise of Foreign Private Property (1976).

89. Id. at 69 (discussing the illusory nature of provisions for payment following the Cuban expropriations).
The Operational Code for nationalizations calls for the resolution of the issue by way of lump-sum settlements. This major variance from a refinement of compensation provisions is the result of several factors. The continued focus by multinational enterprises and their home nation national governments on a supposed validity given by contemporary international law to the idea of prompt, adequate and effective compensation creates an element to which Operational Codes must respond. One element of the Operational Code is its pragmatism. A host nation cannot enforce an Operational Code based on a restrictive Aspirational Declaration, either paying no compensation or only a modest amount, and at the same time expect a continued flow of foreign direct investment. The lump-sum settlement, however, has not found its way into the Public Codes for several reasons. In view of the exceptionally strong mandates in the Aspirational Declarations, adopted by host nation politicians as one of the non-negotiable elements of the New International Economic Order, the main problem in this area is that the public will not agree to revisions of the Public Code to allow for lump-sum settlements. It is also understandable that the area remains in significant conflict, because the effective law is located solely in the Operational Code. That conflict may be reduced in the future by a willingness to recognize that the Operational Code has functioned well and has a large measure of consistency. It is appropriate to develop new Public Codes, or preferably international laws based on lump-sum settlements, which would end both the conflict creating notions of the aspirations of sovereignty and the remnants of the doctrine of prompt, adequate and effective compensation.

The framework of the governance of multinationals presented in this article is not limited to economic issues. It also can be used to clarify activities of foreign direct investment which affect political structures. A primary example involves the making of payments to foreign officials as part of trading activities of multinational enterprises. These payments can have a distinct impact on
political structures.

Aspirational Declarations broadly state that the activities of multinationals should not intervene in the internal affairs of a host state. But there has been little demand by host nations for a detailed and restrictive declaration, which might reduce the effects of fee payments to officials upon political institutions. The Economic and Social Council of the United Nations has discussed the issue, adopted resolutions, and recommended a conference to conclude an international agreement on a list of payments. The discussion of the issue has not received notable priority, nor have Public Codes in host nations been directed to reduce the receipt of these payments or to establish legal structures which would assure fulfillment of the laws enacted to stop the payments. The only major response has been from the United States which adopted the Foreign Corrupt Practices Act in 1976 in order to eliminate the making of improper payments to officials of other nations.

The payments problem is an issue which involves more than simply the enrichment of officials in developing nations. These payments seriously interfere with the political systems in highly industrialized nations as well as in the third world. It is doubtful that the Foreign Corrupt Practices Act would have been enacted had the publicized payments been made only in developing nations. Congress directed its concern primarily toward the destabilization of United States political relationships with advanced nations.

The weakness of Aspirational Declarations and Public Codes regarding corrupt payments, with the exception of the United States, is clear. The rules regarding these payments remain where

90. See Charter of Economic Rights, supra note 37, at art. 2(b).
91. See Resolutions of the Economic and Social Council, on Corrupt Practices, Particularly Illicit Payments in International Commercial Transactions, Res. 2041 (LXI) and Res. 2122 (LXIII), reprinted in K. Simmonds, Multinational Corporations Law, D.4-D.5 (1980).
92. See supra note 19.
93. Payments caused serious disruptions in the governments in Italy, Japan and the Netherlands. The payment in the developing world which received the most publicity was that by United Brands (formerly United Fruit) officials to high government officials (including the president) in Honduras. Activities of United States banana producing companies in Latin America have always generated considerable press attention, and that given to the Honduran payment is as much attributable to the continuing saga of banana companies in the derogatively labelled banana republics, as to the demise of a friendly government. See W. Reisman, Folded Lies, at 65-67 (1979); T. McCann, An American Company, 214-31 (1976).
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they have existed for centuries, within the Operational Code. Governments tend not to move matters from the Operational Code to the Public Code when the matters deal with an issue of substantial self-interest on the part of governing bodies. This is true even where there is much public concern. In all but the most exceptional circumstances, enactments tend to be moral in tone and minimal in teeth.

In the areas of nationalization and joint ventures, there is considerable conflict between the developed and developing world as to the goals to be achieved, while there is much less conflict over payments to officials. The Operational Code for payments to foreign officials creates problems for the participants. Unlike the lump-sum settlement used to resolve nationalization disputes, an agreed-upon payment to an official must remain secret. We thus learn little about the Operational Code unless there is an unexpected disclosure. What appears to be occurring is the continued functioning of an Operational Code mandating payments by multinationals. The United States Foreign Corrupt Practices Act has been challenged, albeit carefully, because a multinational must argue for its repeal without admitting opposition to its moral element. In essence, United States multinationals which make payments abroad must not only know of the Operational Code, but participate in the preservation of the secrecy of that Code.

Host nations are not hesitant to incorporate into the Public Code elements of an Operational Code which have been used by multinational enterprises for their own benefit, even though payments to officials remain secret. The Public Code may reinforce elements of the host nation's Operational Code only to be counteracted by multinationals through the development of an Operational Code which is not under the control of the host nation authorities.

An example is the history of the use of the prestanombre, or name lender, in Mexico. Before the 1973 Investment Law was enacted, foreign investors interested in a foreign direct investment in

94. There is little conflict regarding payments which may destabilize governments. They are uniformly condemned. There are differences of opinion, however, often based on cultural and social elements, as to what constitutes a conflict of interest by a government official. Cultural differences create tension when a nation attempts to curtail payments abroad by its enterprises through the extraterritorial reach of its laws. Those laws may attempt to distinguish between unlawful payments, such as those to encourage officials to disobey their laws, and those lawful (or less unlawful) payments, such as to expedite a normal process, i.e., the movement of goods through customs.
Mexico were often required to accept a joint venture status under the government's Operational Code. Many multinationals were unwilling to relinquish fifty-one percent to Mexican owners, for fear of loss of control. It was not uncommon to place fifty-one percent of the enterprise in the hands of a Mexican, often the enterprise's Mexican attorney. The Mexican attorney turned over the profits to the enterprise and voted "his" shares according to the foreign enterprise's dictates. The Operational Code of the government was satisfied; fifty-one percent of the company was owned locally. The method, however, was not consistent with Mexican government policies. Control remained abroad.

It therefore becomes evident that, according to a host nation, there are acceptable and unacceptable ways to satisfy the dictates of the Operational Code. The acceptable Operational Code would have been to obtain an exception to the majority local ownership requirements by offering a reason to the government, such as that the company was transferring high technology to Mexico. The unacceptable action was resorting to the use of the prestanombre. The 1973 Investment Law sought to correct this problem by providing for sanctions against individuals acting as a prestanombre.

Thus, when a government considers the adoption of a new Public Code, it may incorporate not only provisions supporting the policies which the government has been following in dealing with foreign direct investment through the functioning of the Operational Code, but also provisions counteracting the development of schemes by foreign investors. These schemes may be considered elements of an Operational Code contrary to the interests of the government.

A final example involves the cultural impact of foreign investment. Aspirational Declarations often reflect a concern over the impact of foreign direct investment upon social and cultural institutions, but they tend to concentrate rather broadly on the issue. They generally do not focus attention upon such specific economic issues as the transfer of technology, joint ventures and acquisitions. The Charter of Economic Rights and Duties of States sug-

95. Several cases have occurred where the Mexican attorney sold his interest in the enterprise, obviously much to the consternation of the foreign "parent." Because the Operational Code is secret, including the concept of the prestanombre, the government would deny the existence of that institution, and refuse to provide any support in having the interest returned to the multinational.

96. Mexican Investment Law, supra note 44, at art. 31.
gests that a nation should be able to choose its "social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever." Repeated provisions of the Charter illustrate a belief that social and cultural institutions of a nation should not be harmed by the trading process.

Although host nations have not generally adopted Public Codes to respond to disadvantageous impact on social and cultural institutions by multinational enterprises, such damage has been the subject of considerable writing. One reason for the scarcity of legislation is that specific laws are not easily drafted. The impact tends to be cumulative, through the aggregate presence of foreign influences, extending beyond foreign direct investment to include the impact caused by large numbers of tourists. There has been, however, a response in the Operational Code.

Contrary to the typical lack of response to this problem, in 1976, Mexico passed the Mexican Inventions and Tradenames Law, mandating that the use of trademarks of foreign origin to protect articles manufactured in Mexico must be "in conjunction with a mark originally registered in Mexico." The intention of the law was clear: Mexico wished to establish a Mexican identity with consumers for all products sold in Mexico. This provision, however, proved too aspirational for success as part of the Public Code. Each year its application has been delayed by decrees. The delay might have been accomplished within the Operational Code.

The process of using a formal delay, in contrast to the use of the Operational Code, may illustrate that when the Public Code includes provisions which appear too restrictive to enforce, but are

98. See supra note 75.
100. Mexican Inventions and Trademarks Law, at art. 127. This extensive law, containing 237 articles, contains no other concepts that received such an immediate and negative reaction from multinational enterprises.
101. The legislative history identifies a specific Aspirational Declaration, the desire that all products be known by Mexican names, not by foreign names or, as the law was finally enacted, by joint names. There was some discussion about possible future amendments which would require dropping the foreign name, leaving only the Mexican name.
102. The annual decrees are translated in 1 M. Gordon, Multinationals, supra note 11, at B.2c.
popular, it is better not to allow an Operational Code concept of non-enforcement to arise. Such an extensive variance would mandate a closing of the gap between the Operational Code and the Public Code. Furthermore, since it would be unpalatable to the public to repeal such provisions, the deference in application was accomplished by the formal Public Code delay.

VIII. CONCLUSION

Legal staffs of multinational enterprises are well aware that Operational Codes exist. They are not only the practices of the developing and socialist nations, but are shared by developed nations as well. An awareness of the existence of an Operational Code, and what it is in a given country at a given time, are nevertheless quite different matters. Multinational personnel must know with whom to work if an investment is to be effective. Not every host nation attorney who is adept at understanding the Operational Code has access to all of the Code. Some attorneys can obtain otherwise secret rulings of foreign investment commissions; others cannot and must function as best they can with word-of-mouth knowledge of the Operational Code.

The most successful multinational enterprises are those that are aware of the various sources of law affecting foreign investment. This awareness, however, should not be misinterpreted as constituting control by the multinational enterprise. A multinational which appears to have a foreign investment with attributes which differ from provisions of the Public Code, may simply have "read" the Operational Code more effectively than others. The Operational Code cloaks much activity of foreign direct investment. It can lead to increased criticism from the public sector, particularly the press and academia, which may identify practices of multinationals that appear to the public to be at variance with the Public Code. The multinationals, however, have not necessarily violated the law, they have followed the Operational Code completely in accordance with the practices of the host nation government.

Many officials of developing nations question why their nation is not the recipient of increasing amounts of foreign direct investment. Yet, they often fail to realize that functioning within an often complex matrix of regulations is a costly process to a foreign investor. Medium and smaller firms that are not immediately turned away by a restrictive Public Code, may decline an invest-
ment later in time when they are either unable to comprehend, or unwilling to assume the cost of access to, the Operational Code. The existence of an Operational Code may have benefits for the developing nation, but clearly it has its detriments in discouraging much needed investment.

Operational Codes are unlikely to fade from the control scheme of foreign investments. No serious movement has been made towards a unification of foreign investment laws among the developing nations. Such a process would be extremely difficult, considering the diversity of levels of development and resources among the advanced developing and dependent countries, and the ability to harmonize those interests with those of socialist nations.

Multinationals may expect continued confrontation with a framework of regulations which vary widely from nation-to-nation. But an understanding of the Operational Code, and how Aspirational Declarations may affect the function of the Operational Code, should provide a greater understanding and afford a better degree of predictability to multinationals functioning in developing and socialist host nations. This conceptual framework illustrates that the maze of regulatory patterns is understandable and can be penetrated to the benefit of foreign investors and the development of host nations.